

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

December 17, 2004

IN RE:

**PETITION OF KING'S CHAPEL CAPACITY, LLC FOR
CERTIFICATE OF CONVENIENCE AND NECESSITY
TO SERVE AN AREA IN WILLIAMSON COUNTY,
TENNESSEE KNOWN AS ASHBY COMMUNITY**

**DOCKET NO.
04-00335**

ORDER GRANTING MOTION TO HOLD PROCEEDINGS IN ABEYANCE

This matter came before the Hearing Officer upon the *Motion to Hold Proceedings in Abeyance* ("Motion") filed by Tennessee Wastewater Systems, Inc. ("TWS") on December 2, 2004. On December 9, 2004, King's Chapel Capacity, LLC ("King's Chapel") filed the *Response of King's Chapel Capacity, LLC to Motion to Hold Proceedings in Abeyance* ("Response"). On December 14, 2004, TWS filed a *Motion to File Reply and for Oral Argument*. For the reasons discussed below, the Hearing Officer grants the *Motion to Hold Proceedings in Abeyance* insofar as this matter shall be held in abeyance pending 1) the award or refusal to award to King's Chapel a state operating permit by the Tennessee Department of Environment and Conservation ("TDEC") and the decision by TDEC whether or not to terminate the permit of TWS; and 2) the dismissal of Count III of the Complaint or the determination of the ownership of the sewer system by the Chancery Court in Williamson County. The *Motion to File Reply and for Oral Argument* filed by TWS is denied.

BACKGROUND

On October 5, 2004, King's Chapel filed an application for a Certificate of Public Convenience and Necessity ("*Petition*") to operate wastewater disposal systems in the Ashby Community development in Williamson County, Tennessee.¹ On October 11, 2004, TWS filed a petition to intervene in this docket. King's Chapel filed a response to the petition to intervene on November 17, 2004, in which it opposed the intervention but stated that, if the Authority granted the intervention, it requested an expedited hearing on the *Petition*. At a regularly scheduled Authority Conference held on November 22, 2004, the panel assigned to this docket voted unanimously to grant the petition to intervene filed by TWS and to appoint a Hearing Officer to prepare the matter for hearing by the panel.²

At the request of the parties, the Hearing Officer held a status conference on November 29, 2004. At that status conference, King's Chapel renewed its request for an expedited hearing in this matter and suggested that a hearing be set on a date immediately after the next regularly scheduled Authority Conference to be held on December 13, 2004. TWS stated that, although it had no problem generally with the setting of a procedural schedule by the Hearing Officer, it planned to file a motion by December 1, 2004 to hold this docket in abeyance until the resolution of a lawsuit pending in the Chancery Court of Williamson County, Tennessee between the parties.³ TWS also asserted that it was not feasible to be ready for a hearing by December 13, 2004. King's Chapel stated that resolution of the lawsuit was not necessary for this docket to be

¹ Depending on the document filed in this docket, the area under discussion is also referred to as the "Meadowbrook Subdivision" or the "Meadowbrook at King's Chapel Subdivision" or the "King's Chapel Subdivision" or a "portion of the Milcrofton Utility District in Williamson County." In the absence of a determination as to whether these terms describe the same property or which name may be correct, this order will refer to the property that is the subject of the *Petition* as "the subdivision."

² See Transcript of Authority Conference, pp. 26-29 (November 22, 2004).

³ The *Motion to Hold Proceedings in Abeyance* was filed by TWS on December 2, 2004, rather than December 1, 2004.

resolved by the Authority. At the status conference, the Hearing Officer established a procedural schedule to completion of the docket and granted the request for an expedited hearing in part by setting the matter for a hearing before the panel following the regularly scheduled Authority Conference in January 2005.⁴

MOTION TO HOLD PROCEEDINGS IN ABEYANCE AND RESPONSE

On December 2, 2004, TWS filed its *Motion to Hold Proceedings in Abeyance* (“*Motion*”). In its *Motion*, TWS asserts that it entered into a contract with the developer of the subdivision in which the developer agreed to pay for the construction of the sewer system and the parties agreed that TWS would repair and maintain the system. In addition, TWS asserts that the contract incorporated by reference local regulations which require that, once the system is complete, the land and easements on which it sits will be conveyed to the system operator, which it alleges is TWS. TWS further alleges that the system is substantially complete but that the developer has failed to pay the contract amount or to turn the land and easements over to TWS. TWS has sued King’s Chapel and others in the Chancery Court of Williamson County, Tennessee for damages, declaratory relief and injunctive relief.⁵ Count I of the Complaint alleges that the defendants have breached their contract with TWS. Count II alleges a civil conspiracy among the defendants to defraud, convert and obtain TWS’s property by the submission of the *Petition* to the TRA in which the defendants assert ownership and control of the system. Count III asks for a declaratory ruling that TWS is the owner of the sewer system.

⁴ Pursuant to the procedural schedule as it subsequently was memorialized by written order, the hearing was set for January 13, 2005 at 9 00 a m See *Order Establishing Procedural Schedule*, p 3 (December 3, 2004)

⁵ As indicated in the attachment to the *Motion*, the Verified Complaint of TWS was filed with the Williamson County Clerk and Master on November 1, 2004. Other defendants named are J Powell Development, LLC, John Powell, Elaine Powell, C Wright Pinson, Ashby Communities, LLC, Hang Rock, LLC, and Arrington Meadows, LLC

Count IV asks the Court to order the defendants to convey to TWS the real property on which the system sits. As a result of the pending suit, TWS asserts that the TRA should postpone further action on King's Chapel's *Petition* pending the outcome of the lawsuit. TWS argues that, pursuant to Tenn. Code Ann. § 65-4-203(a) (2004), the Authority cannot issue a certificate authorizing a new utility to compete with an existing one unless the Authority first finds that the facilities of the existing system are inadequate to meet the needs of the public or that the incumbent utility refuses or neglects or is unable to make such additions as needed to provide service. TWS further asserts that King's Chapel has implicitly acknowledged through its filings that the TRA cannot rule on the *Petition* without addressing such contract-related issues as the adequacy and ownership of the existing facilities and the ability and willingness of TWS to provide the requested service. TWS asserts that the legal issues before the Court and those before the TRA are inextricably intertwined and that the TRA must not go forward without guidance from the Court.

In its *Motion*, TWS also states that there are ongoing proceedings at TDEC which will affect the *Petition*. Apparently, King's Chapel has filed an application with TDEC for a state operating permit to provide service to the subdivision.⁶ TWS currently holds a state operating permit to provide service to the subdivision, but TDEC has stated its intention to pursue termination of the permit of TWS.⁷

On December 9, 2004, King's Chapel filed the *Response of King's Chapel Capacity, LLC to Motion to Hold Proceedings in Abeyance* ("Response"). In its *Response*, King's Chapel asserts that although the subdivision is within the service area for which TWS was granted a

⁶ See *Motion*, p. 5, fn. 6 (December 2, 2004)

⁷ See Letter to John Powell from Edward Polk, Manager, Permit Section, Division of Water Pollution Control, p. 1 (October 21, 2004)

Certificate of Convenience and Necessity,⁸ TWS neither owns nor operates any facility capable of serving the subdivision. In addition, King's Chapel asserts that although the developers paid monies to TWS to construct the sewer system, no final agreement was reached and no contract was executed. King's Chapel alleges that the contract submitted to the Authority and on which the Chancery Court suit relies is a forgery. Even if the contract is found not to be a forgery, King's Chapel states that at best it is a construction contract and not a provider contract as alleged by TWS. King's Chapel asserts that Tenn. Code Ann. § 65-4-203(a) (2004) does not apply to the facts in this case because TWS does not own the system and has not offered any proof that it owns the system. Further, King's Chapel argues that the determination of contract damages in the Chancery Court has no bearing on whether it is best suited to operate the sewer system it paid to have built and currently owns. King's Chapel urges the Authority to allow this proceeding to move forward and not to be unreasonably delayed by an anticipated Court order based upon related, but not dependent, issues.

On December 14, 2004, TWS filed a *Motion to File Reply and for Oral Argument*, in which it requests permission to file a reply to King's Chapel's *Response* to address what it asserts are new issues raised by King's Chapel that were not addressed by TWS in its *Motion* and to file a copy of TWS's response to King's Chapel's motion to dismiss filed in the Chancery Court. TWS also requests oral argument on the *Motion*.

⁸ See *In re Petition of On-Site Systems, Inc. to Amend Its Certificate of Convenience and Necessity*, Docket No. 97-01393, *Order Approving Petition of On-Site Systems, Inc. to Amend Its Certificate of Convenience and Necessity for Expansion of Service Area* (March 31, 1998). TWS was formerly known as On-Site Systems, Inc.

DISCUSSION

Tenn. Code Ann. § 65-4-203(a) (2004)⁹ requires the Authority to make a determination as to the adequacy of the existing facilities to meet the reasonable needs of the public before granting a certificate to a competitor. TWS asserts that the *Petition* should be evaluated pursuant to that statute and King's Chapel asserts that the statute does not apply. The Authority cannot move forward with proceedings to approve or deny King's Chapel's *Petition* until it determines whether that statute should be used to evaluate that *Petition*. However, the Authority cannot determine the applicability of Tenn. Code Ann. § 65-4-203(a) (2004) until it determines if one of the parties is an incumbent and one of the parties is a competitor pursuant to the terms of that statute. The Authority cannot determine the respective status of the parties until the Chancery Court determines who owns the sewer system and TDEC determines who will ultimately possess a state operating permit to provide service to the subdivision. Thus, the dispute over the ownership of the sewer system currently being litigated in the Chancery Court, coupled with the uncertainty over which party ultimately will possess a state operating permit from TDEC, serves to render any evaluation of the *Petition* by the Authority premature until these issues are resolved.

As a result, the Hearing Officer finds that it would be imprudent for the Authority to move forward with this docket until the uncertainties regarding which party has a state operating permit to provide service to the subdivision and which party has ownership of the system are

⁹ Tenn Code Ann § 65-4-203(a) (2004) reads

(a) The Authority shall not grant a certificate for a proposed route, plant, line, or system, or extension thereof, which will be in competition with any other route, plant, line, or system, unless it shall first determine that the facilities of the existing route, plant, line, or system are inadequate to meet the reasonable needs of the public, or the public utility operating the same refuses or neglects or is unable to or has refused or neglected, after reasonable opportunity after notice, to make such additions and extensions as may reasonably be required under the provision of this part

determined. Therefore, this docket will be held in abeyance pending 1) the award or refusal to award to King's Chapel a state operating permit by TDEC and the decision by TDEC whether or not to terminate the permit of TWS; and 2) the dismissal of Count III of the Complaint or the determination of the ownership of the sewer system by the Chancery Court in Williamson County. The parties are directed to file with the Authority any decision by TDEC concerning the issuance or termination of the state operating permit of either party to provide service to the subdivision and any decision by the Chancery Court either dismissing Count III of the Complaint or determining the ownership of the sewer system. As a result of this decision and the granting of the *Motion*, the Hearing Officer finds the *Motion to File Reply and for Oral Argument* is moot and should be denied.

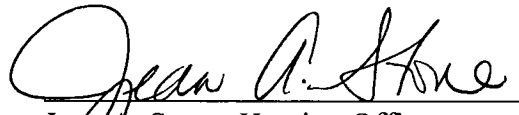
IT IS THEREFORE ORDERED THAT:

1. The *Motion to Hold Proceedings in Abeyance* filed by Tennessee Wastewater Systems, Inc. is granted insofar as this matter shall be held in abeyance pending 1) the award or refusal to award to King's Chapel Capacity, LLC a state operating permit by the Tennessee Department of Environment and Conservation and the decision whether or not to terminate the permit of Tennessee Wastewater Systems, Inc. by the Tennessee Department of Environment and Conservation; and 2) the dismissal of Count III of the Complaint or the determination of the ownership of the sewer system by the Chancery Court in Williamson County.

2. The parties are directed to file with the Authority any written decision or any other filing evidencing a decision by the Tennessee Department of Environment and Conservation concerning the issuance or termination of the state operating permit of either party to provide service in the subdivision.

3. The parties are directed to file with the Authority any written decision or any other filing evidencing a decision by the Chancery Court in Williamson County, Tennessee either dismissing Count III of the Complaint or determining the ownership of the sewer system in question.

4. The *Motion to File Reply and for Oral Argument* filed by Tennessee Wastewater Systems, Inc. is denied.


Jean A. Stone, Hearing Officer